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Supreme Court, U.S.
FILED

APR 13 1987

No. _____

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

SANDRA LOUISE FERRINO,

Petitioner

v.

CUNARD LINE LIMITED,

Respondent

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT**

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QUESTION PRESENTED

Did not the United States Court of Appeals for the Third Circuit err when it determined in disparity with the holdings of the United States Court of Appeals for the First and Sixth Circuits that, as a matter of law, reasonable notice had been afforded Petitioner in the warning on cover of passage contract issued by Respondent as to the time limitation to bring subsequent legal action?

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Certiorari is essential to prevent grave injustice to the Petitioner in that the Order of the United States District Court for the Eastern District of Pennsylvania as affirmed by the Judgment Order of the United States Court of Appeals for the Third Circuit, creates a disparity as to what constitutes reasonable notice as determined by the United States Courts of Appeals, First and Sixth Circuit, as a matter of law on the same issue.	
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To the Honorable, the Chief Justice and the Associate Justice of the Supreme Court of the United States:

Petitioner, SANDRA LOUISE FERRINO, respectfully prays that a Writ of Certiorari issue to review Judgment Order of the United States Court of Appeals for the Third Circuit, entered in the above case on September 22, 1986, affirming the Order of the United States District Court for the Eastern District of Pennsylvania in favor of Respondent, CUNARD LINE LIMITED, against SANDRA LOUISE FERRINO.

OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit denied a Petition Sur Rehearing on January 14, 1987. (Appendix D, pp. A-9).

The United States Court of Appeals for the Third Circuit entered a Judgment Order (Appendix C, pp. A-8) on September 22, 1986 affirming the Judgment in favor of Respondent, CUNARD LINE LIMITED, and against Petitioner, SANDRA LOUISE FERRINO.

The United States District Court for the Eastern District of Pennsylvania issued an Order on February 10, 1986, in favor of Respondent, CUNARD LINE LIMITED and against Petitioner, SANDRA LOUISE FERRINO. (Appendix B, pp. A-2.)

JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the Judgment of the United States District Court for the Eastern District Court of Pennsylvania, was entered on September 22, 1986, and is printed, infra. (Appendix C, pp. A-8)

The Order of the United States Court of Appeals for the Third Circuit denying Petitioners' Petition for Rehearing was entered on January 14, 1987 and is printed infra. (Appendix D, pp. A-9) The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

STATUTES INVOLVED

The statutory provision involved is 28 U.S.C.A. §1254(1). This provision is printed infra. (Appendix A, pp. A-1).

STATEMENT OF THE CASE

The instant case is an appeal from a Judgment Order of the United States Court of Appeals for the Third Circuit, entered September 22, 1986 affirming a Judgment of the United States District Court for the Eastern District of Pennsylvania dated February 10, 1986, granting Respondents a Motion for Summary Judgment. The Petition for Rehearing by the United States Court of Appeals for the Third Circuit was denied on January 14, 1987.

On May 3, 1985, Petitioner Sandra Louise Ferrino, commenced suit in Philadelphia Court of Common Pleas seeking damages for personal injuries she sustained while a passenger aboard the cruise ship, Queen Elizabeth II, owned and operated by Cunard. The case was removed to the United States District Court for the Eastern District of Pennsylvania by Cunard, pursuant to 28 U.S.C. §1441 because the Court had diversity jurisdiction. 28 U.S.C. §1332.

Respondent Cunard filed a Motion for Summary Judgment on July 26, 1986 based on the suit time limitations clause in the contract of passage issued to Petitioner.

On February 7, 1986 after Amended Motion was filed, an Order for Judgment in favor of Cunard was decided as a matter of law because Petitioner had not offered any affidavit of evidence of a different Passage Contract in question. (Appendix B, pp. A-2)

On September 22, 1986, the United States Court of Appeals for the Third Circuit affirmed the Judgment of the District Court. (Appendix C, pp. A-8) The United States Court of Appeals for the Third Circuit entered an Order denying Petition for Rehearing on January 14, 1987. (Appendix D, pp. A-9).

The issue presented by the instant Petition concerns Petitioner's loss of substantial rights due to the lower court's conclusion as a matter of law that the standard of reasonable notice of such time limitations to bring suit was communicated by facial warnings on passage contract issued by Respondent.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Certiorari is essential to prevent grave injustice to the Petitioner, SANDRA LOUISE FERRINO, in that the Order of the United States District Court for the Eastern District of Pennsylvania, as affirmed by the Judgment Order of the United States Court of Appeals for the Third Circuit mandates that Petitioner be subject to a holding that as a matter of law is in disparity with other Courts of Appeals' decisions on similar issues concerning passage contracts.

It is established that Courts have uniformly held a passenger bound by the terms of the contract where the face of the passenger contract/ticket contains a conspicuous notice directing the passenger to examine contractual provision *Straus v. Norwegian Caribbean Lines*, 613 F. Supp. 5, 8 (E.D. Pa. 1984). The United States Court of Appeals for the Third Circuit determined that in order to resolve this issue of notice on the face of the ticket as effectiveness of the conspicuous notice given the ticket holder. The United States Court of Appeals for the First Circuit determined that the first page should "explicitly call attention to the terms and conditions of the ticket/contract." *Shankles Costa Armatori, S.P.A.* 722 F.2d 861, 865 (1st Cir. 1981). However, in the Petitioner's case the Court of Appeals for the Third Circuit agreed with the District Court and found as a matter of law that the passage contract sub judice was sufficient even though the terms were not completely listed on the front cover but continued on an additional page. Although the District Court relied on other circumstances, as well, in its granting Respondent's Motion for Summary Judgment, petitioner asserts that the facial notice could not meet the standard established by *Shankles*.

The Petitioner's contract passage ticket offered partial notification because it has an incomplete sentence on the cover which failed to meet the aforementioned standard of the *Shankles* court. The complete conditions of terms were not designated on the cover but continued in a bifurcated statement onto page three of ticket/passage contract; thus discouraging comprehension.

The Court of Appeals for the Sixth Circuit also presents a disparity to the lower court's ruling in the instant case in a decision it rendered in *Barbachym vs. Costa Line, Inc.*, 713 F.2d 216, 219 (6th Cir. 1983). That Court held that "unless the face of the ticket contains conspicuous language directing the passenger's attention to the contractual terms contained in the material furnished by the carrier", courts generally do not enforce liability limitations in a passage contract. This holding is the second Court of Appeals' decision to provide a disparity with the holding by the Court of Appeals of the Third Circuit in the instant case.

Although the ticket face on *Barbachym* is distinguishable because it contained no conspicuous language, Petitioner contends that in the instant case an incomplete sentence of twenty-three words which was continued onto page three of passage contract failed to direct Petitioner's attention to contractual terms contained in other material of the ticket.

The *Barbachym* Court is also relied upon by Petitioner for its support issued in dictum of Petitioner's contention that a time limitation provision should be more prominently displayed in the terms of passage contract. *Barbachym*, supra 713 F.2d at 220.

If a Petitioner is going to be deprived of essential property rights of instituting legal action within a time limitation, significant notice must be afforded to provide the due process necessary. Because of the disparity between Courts of Appeals' decision of First, Third and Sixth Circuits in determining, as a matter of law, the sufficiency of facial notice on an ocean voyage passage/contract, Petitioner suffers substantial harm: she will be denied a legal remedy in a claim for personal injuries. Accordingly, it is respectfully requested that this Court grant the within Petition for Certiorari in order to uphold the Petitioner's legal rights in accordance with other Courts' of Appeals decisions on similar issues concerning passage contracts.

CONCLUSION

The decision below, affirming the adequacy of facial notice on Petitioners passage contract as a matter of law, is in disparity with two other circuits' decisions of similar issues and denies Petitioner of due notice of time period to pursue guaranteed rights to pursue legal remedies.

Therefore the herewith Petition for Writ of Certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

Robert A. Rovner
ROVNER, ALLEN, SEIKEN & ROVNER
Counsel for Petitioner



APPENDIX



APPENDIX A

28 U.S.C.A. §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

- (1) By Writ of Certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree.

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

SANDRA LOUISE FERRINO	:	CIVIL ACTION
v.	:	
CUNARD LINE LIMITED	:	NO. 85-2991

MEMORANDUM AND ORDER

KELLY, J. FEBRUARY 7, 1986

The plaintiff, Sandra Louise Ferrino, has brought suit against the defendant, Cunard Line Limited ("Cunard"), to recover for injuries she allegedly sustained while on an ocean voyage aboard the Queen Elizabeth II, which is owned and operated by Cunard. The defendant moves the court to enter summary judgment in its favor pursuant to Fed. R. Civ. P. 56, and dismiss with prejudice the plaintiff's claims. The defendant's motion is based on an assertion that the cause of action is time barred by a limitations clause contained in the passage contract ticket issued to Ms. Ferrino. For the following reasons, the defendant's motion will be granted.

The party moving for summary judgment pursuant to Fed. R. Civ. P. 56 has the burden of demonstrating that there is "no genuine issue as to any material fact" and that he is entitled to judgment as a matter of law. 10A Wright, Miller & Kane, *Federal Practice & Procedure: Civil* 2d §2727 at 133 (1983). Facts asserted by the party opposing the motion are regarded as true if supported by affidavits or other evidentiary material. *Id.* at 127-28. In deciding the motion, all doubts must be resolved in favor of the party opposing summary judgment. *Wright v. Federal Machine Co., Inc.*, 353 F. Supp. 645, 647 (E.D. Pa. 1982).

FACTUAL ISSUES

The plaintiff asserts in her amended answer to the amended motion for summary judgment that "defendant has failed to reproduce an identical ticket such as that issued to plaintiff." However, the plaintiff has not brought forth countervailing evidence in order to show that this issue of fact is genuine. The plaintiff claims that "by defendant's cover letter to the Honorable James McGirr Kelly, dated November 18, 1985, it is admitted that the attached specimen is not an exact replica of the Passage Contract issued to Plaintiff." That is not accurate. The defendant's letter of November 18th specifies that an exact replica was attached to the original copy of the defendant's amended motion, which was filed with the court, and that the copy of the motion delivered to the plaintiff contained a photocopy of this exact replica. The letter also articulated the defendant's intention to furnish the plaintiff with an exact replica, in addition to the photocopy, if another is found by the defendant company.

The defendant has provided the testimony of Frank V. Kelly, the administrator of legal affairs for the New York office of Cunard, that the plaintiff was issued a ticket book which had the same format as the specimen attached to the defendant's motion. The plaintiff has not come forward with any evidence which contravenes this testimony. Furthermore, the plaintiff has been unwilling to admit or deny whether the passage contract attached to the pleading is the same type as that issued to the plaintiff on her voyage. The plaintiff merely answers the defendant's assertion by stating "denied in part; admitted in part. It is not known if the specimen that Cunard has now uncovered is in fact the true and correct specimen of the Passage Contract issued to Plaintiff for the voyage on the Queen Elizabeth 2." The unwillingness to admit or deny the assertion does not create any factual issues to prevent the court from determining the summary judgment motion as a matter of law. No evidence has been revealed by the plaintiff to contradict the affidavits presented by the defendant or to indicate that a representative example of the passage contract has not been produced.

LEGAL ISSUES

The plaintiff's cruise aboard the Queen Elizabeth II occurred from May 5 to May 8, 1983. On May 3, 1985 the plaintiff filed a complaint alleging that she sustained personal injuries aboard the vessel on May 6, 1983. The plaintiff's contract of passage includes a clause that suits for personal injuries must be brought within a year after the date on which the alleged injury occurred. Because the plaintiff was eleven months beyond the contractual limitation period when she filed suit, the defendant moved for summary judgment. The motion brings two legal issues before the court: first, whether the one year limitation clause is legally valid, and second, whether the contractual terms are legally binding and therefore enforceable against the plaintiff.

Pursuant to 46 U.S.C. §183b(a) (1982), owners, operators, and agents of seagoing vessels may limit their liability for personal injury claims to those suits on such claims which have been instituted within one year of the date such injury occurred. *Barbachym v. Costa Line, Inc.*, 713 F.2d 216, 218 (6th Cir. 1983); *Strauss v. Norwegian Caribbean Lines*, 613 F. Supp. 5, 7 (E.D. Pa. 1984). A carrier seeking to utilize this statute of limitations by incorporating it into its contract of passage is required to have "done all it reasonably could to warn the passenger that the terms and conditions were important matters of contract affecting his legal rights." *Silvestri v. Italia Societa per Azione di Navigazione*, 388 F.2d 11, 17 (2d Cir. 1968). Whether the defendant has met the standard of reasonableness in communicating this information is a question of law for the court to decide. *Barbachym*, 713 F.2d at 218 *Shankes v. Costa Armatori, S.P.A.*, 722 F.2d 861, 867 (1st Cir. 1983); *Strauss*, 613 F. Supp. at 7.

The Passage Contract ticket/booklet issued to plaintiff by Cunard was a contract which contained a number of printed terms and conditions. Across the center of the face or cover of the ticket/booklet, prominently displayed in large, black type against an orange background was "PASSAGE CONTRACT." Also on

the cover in bold, black type was a notice designed to alert passengers to the existence and importance of the contract provisions:

IMPORTANT PLEASE READ FOLLOWING TERMS OF PASSAGE CONTRACT: For valuable consideration, Cunard Line Limited, hereafter referred to as the "Company", agrees to provide (continued on page 3)

This notice continued on page 3 as follows:

the transportation specified herein for the passenger or passengers named herein, subject to all terms printed on the cover of this Passage Contract and on pages 3, 4, 5, 6 and 7.

The terms and conditions of the passage contract appearing on pages 3 and 7 were arranged into separate, numbered Articles with a heading for each Article in bold, upper-case type. The heading for Article 2 on page 3 was "**PASSAGE CONTRACT CONSTITUTES ENTIRE AGREEMENT.**" The text of Article 2 read:

All prior understandings and agreements heretofore entered into between the passenger and the Company whether written or oral are superseded by and merged in this Passage Contract, which alone fully and completely expresses the agreement between the passenger and the Company.

Article 21 on page 7 of the Passage Contract stated as follows:

TIME LIMIT ON SUITS Suit to recover on any claim against the Company shall be instituted: (1) As to claims mentioned in subdivision-(a) of Article 20 above, within 1 year from the date when the loss of life or injury occurred, in accordance with Section 4283A of the Revised Statutes of the United States; (2) as to all other claims, including breach of contract, within 6 months from the passenger's arrival at destination or, in the case of nonarrival, from the day on which the passenger and/or the baggage should have arrived.

Article 21 of the Passage Contract clearly complies with 46 U.S.C. §183b(a) and is therefore legally valid. Where the face of the passenger contract ticket contains a conspicuous notice directing the passenger to examine the contractual provisions, courts have uniformly held the passenger bound by the terms of the contract. *Strauss*, 613 F. Supp. at 8 (citations omitted). I find that the contract reasonably communicates to the passenger the existence of important terms and conditions which affect legal rights, and therefore, is legally binding and enforceable against the plaintiff. This decision is supported by the format and specifications of the ticket book, as described above, and also by the circumstances surrounding the purchase and retention of the ticket contract. The plaintiff was issued the passage contract ticket on February 15, 1983 and had it in her possession for at least two months before boarding the vessel. Additionally, the plaintiff's attorney, who was retained several days after Ms. Ferrino returned from her voyage, received letters from Cunard's manager of legal affairs which advised of Cunard's intent to rely on the defenses set forth in the passage contract.

I am satisfied that the defendant provided adequate notice of the relevant contractual provisions. I am not persuaded by the plaintiff's argument that the provision "was not sufficiently eye-catching" and should have been more "prominently displayed". The print in Article 21 of the contract is small, but unquestionably readable, and bears a heading in boldfaced, upper case, larger print designed to catch the passenger's eye and provide a quick summary of the contents of the provision. The heading for Article 21 reads "TIME LIMIT ON SUITS".

Because the plaintiff failed to file her suit within one year after her alleged injuries, as is required by her contract of passage, and because the "reasonable communicativeness" of the passage contract has been established as a matter of law, summary judgment will be entered in favor of the defendant.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDRA LOUISE FERRINO : CIVIL ACTION
v. :
CUNARD LINE LIMITED : NO. 85-2991

ORDER

AND NOW, this 7th day of February, 1986, for the reasons set forth in the foregoing Memorandum, it is ORDERED that the motion of defendant, Cunard Line Limited, for summary judgment is GRANTED. Judgment is entered in favor of defendant, Cunard Line Limited, and against plaintiff, Sandra Louise Ferrino.

BY THE COURT:

JAMES McGIRR KELLY, J.

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 86-1106

FERRINO, SANDRA LOUISE

v.

CUNARD LINE LTD.

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Docket No. Civil 85-2991
District Judge: Honorable James McGirr Kelly

Submitted Under Third Circuit Rule 12(6) September 11, 1986
Before ALDISERT, *Chief Judge*, HIGGINBOTHAM and
HUNTER, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it
is

ADJUDGED and ORDERED that the judgment of the dis-
trict court be and is hereby affirmed.

Costs taxed against appellant.

By the Court

JAMES HUNTER, III, *Circuit Judge*

Attest:

Clerk

Dated September 22, 1986

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 86-1106

FERRINO, SANDRA LOUISE

v.

CUNARD LINE LTD.

(D.C. Civ. No. 85-2991)

SUR PETITION FOR PANEL REHEARING

Present: HIGGINBOTHAM, ALDISERT and HUNTER, *Circuit Judges*.

The petition for rehearing filed by Sandra Louise Ferrino, appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for rehearing, and none of the members of the panel having voted for rehearing, the petition for rehearing is denied.

BY THE COURT,

Circuit Judge

Dated: January 14, 1987